

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TOM ELAM)	
Claimant)	
VS.)	
)	
HUTCHINSON CORRECTIONAL FACILITY)	Docket Nos. 179,845
Respondent)	180,405
AND)	
)	
STATE SELF INSURANCE FUND)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Appeals Board has considered the claimant's Application For Review of the August 22, 1994 Award by Administrative Law Judge George R. Robertson.

APPEARANCES

The claimant appeared by and through his attorney, Scott J. Mann of Hutchinson, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Richard L. Friedeman of Great Bend, Kansas. The Kansas Workers Compensation Fund appeared through its attorney, William Mitchell of Hutchinson, Kansas.

RECORD

The record considered by the Appeals Board as to each docketed claim is the same as that enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties as to both docketed claims are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge denied compensation in both docketed claims finding claimant had failed to meet his burden of proving that his injuries arose out of and in the course of his employment with the respondent.

In the event the Appeals Board were to reverse the negative finding of the Administrative Law Judge with regard to the issue of arising out of and in the course of employment, these matters would be remanded to the Administrative Law Judge for further findings and conclusions with respect to the remaining issues.

Accordingly, other than the evidentiary rulings which must also be addressed for purposes of this review, the sole issue currently before the Appeals Board is whether claimant's alleged accidental injuries arose out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Administrative Law Judge listed the June 20, 1994 deposition of Dr. Robert A. Rawcliffe, Jr., as a part of the record in this case. However, in paragraph number 6 of his Findings of Fact, the Administrative Law Judge finds as follows:

“6. There is an application and a motion on file to not consider the deposition of Dr. Rawcliffe for failure to comply with K.S.A. 44-515.

“When the report is not furnished within fifteen days after such examination and treatment, then the health care provider, as selected, shall not be permitted afterwards to give evidence of the condition of the employee at the time such examination was made.

“The Court finds that the respondent and the fund did not comply with K.S.A. 44-515, and therefore, Dr. Rawcliffe's deposition shall not be considered for the purposes of this award.”

K.S.A. 44-515 provides in pertinent part the following:

“(a) . . . Any employee so submitting to an examination or such employee's authorized representative shall upon request be entitled to receive and shall have delivered to such employee a copy of the health care provider's report of such examination within 15 days after such examination, which report shall be identical to the report submitted to the employer. . . .

“(c) Unless a report is furnished as provided in subsection (a) . . . the health care providers selected by the employer or employee shall not be

permitted afterwards to give evidence of the condition of the employee at the time such examination was made.”

The facts in this case are that Dr. Rawcliffe performed a medical examination of the claimant at the request of respondent and the Fund on June 1, 1994. His written report of that examination, which is Exhibit No. 1 to his deposition, was provided to counsel for respondent on June 17, 1994. Respondent's counsel immediately transmitted a copy of that report by facsimile to claimant's counsel. Thus, the report was furnished sixteen (16) days after the examination.

The Appeals Board is mindful of the mandatory language of K.S.A. 44-515 and is concerned whether the statute can be reasonably construed. A literal reading of the statute requires a production of a medical report within fifteen (15) days of evaluation when a report is requested. The statute does not address whether the demand is required before or after the evaluation nor does it address the situation where the health care provider is unable, due to justifiable circumstances, to provide a report within the fifteen (15) day period. There are many other practical eventualities that do not fit well within the strictures of this statute, such as where a party requests a report after the evaluation, but the party is unable, despite a good faith attempt, to deliver the report before the expiration of the allotted fifteen (15) day period. In addition, in this case the medical examination in question was requested by the respondent, but Dr. Rawcliffe's evidentiary deposition was taken on behalf of the Fund. Should the Fund be precluded from presenting evidence due to the respondent's failure to provide a report within fifteen (15) days?

When considering this issue, another statute to be considered is K.S.A. 44-523 which provides that the administrative law judge and the Appeals Board shall not be bound by technical rules of procedure but shall give the parties reasonable opportunity to be heard and present evidence.

A primary goal of the Workers Compensation Act is to encourage and facilitate the sharing of information and evidence in order to promote the prompt resolution of claims so as to avoid needless litigation and expense. Whereas a literal reading of K.S.A. 44-515 may require a party to resubmit a claimant to multiple medical evaluations in order to meet the deadlines set forth by this statute, the Appeals Board finds that such an interpretation would be unreasonable and contrary to the spirit and intent of the Act.

The Appeals Board finds the primary purpose of K.S.A. 44-515 is to prevent a party from withholding a medical report which, in the absence of its production, could cause prejudice or unfairness to an adverse party. Although there may be others, two situations in which it is clear that prejudice would result is where the report contains information that could be construed as adverse to the party withholding same, and where failure to produce such a report subjects a party to unfair surprise.

The Appeals Board finds that in the absence of a showing of unfair surprise or prejudice directly caused by the failure or delay in providing a health care provider's report, the testimony of the health care provider should be permitted. Such is the goal and intent of the Act.

Respondent's counsel furnished claimant's counsel with a copy of Dr. Rawcliffe's report immediately upon its receipt which was three days before the scheduled deposition of Dr. Rawcliffe. Although claimant's counsel moved to quash the deposition of Dr. Rawcliffe, objected to its being taken and moved for its exclusion under K.S.A. 44-515, claimant's counsel did not seek a continuance of the deposition nor allege that additional time was needed to prepare for same. Claimant was not prejudiced nor unfairly surprised due to the one day delay in receipt of the medical report. The spirit and intent of K.S.A. 44-515 has been met and Dr. Rawcliffe's testimony is to be considered.

The Appeals Board further finds that claimant's counsel did not make a specific request for the report of Dr. Rawcliffe pursuant to K.S.A. 44-515(a), and therefore, cannot rely upon K.S.A. 44-515(c) to exclude Dr. Rawcliffe's testimony. Furthermore, the testimony of Dr. Rawcliffe contains opinions which are not related to "the condition of the employee at the time such examination was made." To the extent the opinions of Dr. Rawcliffe do not depend upon his June 1, 1994 examination of claimant which was conducted pursuant to K.S.A. 44-515, they can also be admitted.

Claimant also objects to the admission of Dr. Rawcliffe's deposition testimony on the basis that it was taken outside respondent's terminal date. However, Dr. Rawcliffe's testimony was offered on behalf of both respondent and the Fund. The deposition transcript reflects that the evidentiary deposition of Dr. Robert A. Rawcliffe, Jr., M.D., was taken on behalf of the Fund. The terminal dates established by the Administrative Law Judge were June 7, 1994 for the respondent and June 22, 1994 for the Fund. Therefore, the June 20, 1994 deposition of Dr. Rawcliffe was timely as it was taken and offered as a part of the evidence submitted by the Fund.

Claimant argues that the Administrative Law Judge erred in finding that the claimant had failed to carry his burden of proof that his injuries arose out of and in the course of his employment with the respondent. In support of this contention the claimant points out that with the exclusion of Dr. Rawcliffe's testimony, the testimony of claimant's medical expert, Dr. C. Reiff Brown, is uncontradicted. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy and is otherwise ordinarily regarded as conclusive. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The Administrative Law Judge found Dr. Brown's testimony to be untrustworthy because he relied upon an inaccurate history given to him by claimant. Claimant's description of the repetitive nature of his job duties was found to be greatly exaggerated as were his symptoms and complaints. The Appeals Board agrees with the findings of the Administrative Law Judge with regard to the unreliable history taken by Dr. Brown from the claimant. In addition, the Appeals Board has also considered the testimony of Dr. Rawcliffe which does not relate claimant's repetitive/cumulative trauma syndromes to his employment with the respondent. The Appeals Board finds that the testimony of Dr. Brown is not uncontradicted and further finds the testimony of Dr. Rawcliffe to be the more credible and reliable.

Having reviewed the entire record, the Appeals Board finds the findings and conclusions enumerated in the Award of the Administrative Law Judge to be accurate and appropriate, and adopts same as its own findings as if specifically set forth herein to the extent they are not inconsistent with the findings and conclusions hereinabove stated. The

Appeals Board specifically affirms the finding of the Administrative Law Judge that the claimant has not met his burden of proving that he sustained personal injuries by accident arising out of and in the course of his employment with the respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated August 22, 1994 should be, and hereby is, affirmed, and the orders contained in said Award in both Docket Numbers 179,845 and 180,405 are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Hutchinson, Kansas
 Richard L. Friedeman, Great Bend, Kansas
 William Mitchell, Hutchinson, Kansas
 George R. Robertson, Administrative Law Judge
 Philip S. Harness, Director